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Nos. 72-777 and 72-1129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, ET AL., *Petitioners,*

v.

JO CAROL LAFLEUR, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

No. 72-1129

SUSAN COHEN, *Petitioner,*

v.

CHESTERFIELD COUNTY SCHOOL BOARD, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, INC. TO FILE BRIEF AS AMICI CURIAE

The National Education Association (NEA) and the Women's Equity Action League Educational and Legal Defense Fund, Inc. (WEAL Fund) hereby move, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amici curiae,* in

support of respondents in No. 72-777 and petitioner in No. 72-1129. Consent to file this brief was requested of the parties, but petitioners in No. 72-777 and respondents in No. 72-1129 refused to grant such consent.

NEA, organized in 1857 and chartered by special act of Congress in 1906, is the Nation's oldest and largest organization of professional educators. It is also the largest organization of public employees in the nation, with almost 1.4 million members. NEA's purposes, as set forth in its Charter, are "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States."

NEA is strongly opposed to all forms of discrimination on the basis of race, sex, or other arbitrary classification, in the field of education and elsewhere. Its 1972 Convention adopted a specific resolution on equal opportunity for women, which provides in part (NEA, *Handbook 1973* 62):

> The Association . . . urges governing boards, and education associations to eliminate discriminatory practices against women in employment, promotion, compensation, and the appointment or election to leadership positions.

WEAL Fund is a non-profit tax exempt corporation among whose purposes, as stated in its bylaws, are:

> To render legal assistance and services to bring women within the full ambit and application of the United States Constitution . . . to insure their full recognition and participation in the educational and economic activities and other facets of American life without discrimination on account of sex . . . to provide legal support and

> advice to those seeking employment, promotion or employment benefits without discrimination because of sex . . .

NEA and WEAL Fund believe that the mandatory maternity-leave rules at issue here discriminate against female teachers and are detrimental to the educational process. The rules are an anachronism, held over from an era when matters relating to sex and childbirth were deliberately hidden from children, and when the condition of pregnancy—even in married women—was considered slightly indelicate or even impure. Whatever the sensitivities of an earlier age, a rule which today forces a teacher to forfeit her job merely because she is pregnant, without regard to her personal condition and ability to continue working, is educationally unsound and legally unjustifiable. In the context of a state-run public school system, such a rule constitutes a denial of equal protection of the laws.

The brief and arguments of the parties will necessarily concentrate on the specific facts and issues in these particular cases. The maternity leave rules involved in these two cases, however, are not unusual or unique. As the attached brief demonstrates, most school systems in the United States have similar rules. NEA and WEAL Fund believe, therefore, that the Court's consideration of the issues presented by the parties will be aided by an understanding of the original purposes and historical antecedents of these policies, and the effects which they have on the careers of female teachers of child-bearing age. It is these matters, which will not be covered in detail by the parties, to which the attached brief is addressed.

Wherefore, NEA and WEAL Fund request that this Court grant leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, AMICI CURIAE

INTRODUCTION

This brief does not repeat the legal arguments made by the parties. Suffice it to say these *amici* support the contention of the respondents in No. 72-777 and the petitioner in No. 72-1129 that maternity-leave policies which treat pregnancy differently from other forms of tem-

porary disability, and which require pregnant teachers to leave their jobs at a specified stage of pregnancy without regard to their individual ability to continue working, constitute a form of discrimination based on sex and deny pregnant teachers the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution. In our view, these regulations meet neither the "compelling state interest" test which this Court applies to "suspect classifications" nor the more permissive "reasonable classification" test which is generally applicable in equal protection cases.

While we will leave the discussion of these matters to the parties, we believe that a fully-informed consideration of the issues depends upon an understanding of the origins of maternity-leave policies of the kind involved here and their practical effect on female teachers of child-bearing age. The school systems involved in these and other cases have attempted to justify their policies in a variety of ways, but the available historical and empirical evidence supports a conclusion that current maternity-leave policies are rooted in archaic and Victorian attitudes toward pregnancy and paternalistic attitudes toward women. They are part of a pattern of discrimination against women which has long existed, and which still exists, in the Nation's public school systems.

In the first section of this brief, we document these contentions by tracing the original purposes and historical antecedents of mandatory maternity-leave policies. In part II, we analyze the practical impact of mandatory maternity-leave policies on female teachers. As we show, while women constitute the vast majority of all teachers in the public schools, they are

still far from reaching a status of equality with their male counterparts. We believe, and will demonstrate, that mandatory maternity-leave policies contribute significantly to the perpetuation of this unjustified discrimination.

We do not claim that either the historical origins or the practical effects of the various maternity-leave policies are in themselves determinative of the constitutional issues involved here. We do believe, however, that an understanding of the origins and effects of the policies is necessary to place the constitutional issues in proper perspective. We hope in this way to assist the Court in deciding the ultimate question of whether the perpetuation of such policies does in fact deny pregnant teachers the equal protection of the laws.

ARGUMENT

I.

THE MATERNITY-LEAVE POLICIES AT ISSUE HERE, LIKE SIMILAR POLICIES WHICH EXIST IN MOST SCHOOL SYSTEMS, ARE DERIVED FROM VICTORIAN ATTITUDES TOWARD PREGNANCY AND WOMEN AND ARE PART OF A HISTORICAL PATTERN OF DISCRIMINATION AGAINST FEMALE TEACHERS

A. Mandatory Maternity-Leave Policies Are Based on a Victorian Attitude Toward Pregnancy and a Paternalistic Attitude Toward Women

At the outset, it should be recognized that the maternity-leave policies involved in these cases are by no means unique. Similar policies exist in the vast majority of public school systems in the United States.[1] A 1966 survey conducted by NEA of school

[1] Of course, maternity leave regulations of a number of school systems are currently in a state of flux, as a result of the fact that federal courts in every Circuit except the Fourth have decided the issue of mandatory maternity leave favorably to the teachers mounting such challenges. *See* Brief for Petitioner 30, No.72-1129.

systems with enrollments of 25,000 or more students indicated that 49 per cent of schools granting maternity leave required pregnant teachers to take leave at the end of either the fourth or fifth month of pregnancy. An additional 8.7 per cent specified an earlier date, and 29.8 per cent specified a later date—the latest being at the end of the seventh month of pregnancy.[2]

Several of these policies, by their express terms,[3] show that they are based on a prudish aversion to the appearance of pregnancy and a belief that pregnancy is somehow an unwholesome or embarrassing condition to which young children should not be exposed. Under these policies, the mandatory time of termination is often determined not by the length of pregnancy but rather by the teacher's appearance. For example, in Tipp City, Ohio, a teacher must terminate her services five months prior to the expected date of birth or "earlier if the evidence of pregnancy is too pronounced";[4] in Danville, Kentucky, a teacher must request leave at the beginning of the fifth month of pregnancy unless "the pregnancy

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[2] NEA Research Div., Maternity Leave Provisions for Classroom Teachers in Larger School Systems 2 (Educational Research Service Circular No. 3, 1966) [hereinafter cited as ERS 1966 Circular]. The results of this survey indicate a more permissive policy than would be reflected in a survey which included school systems with enrollments of less than 25,000. *Compare, e.g.*, NEA Research Div., Leaves of Absence for Classroom Teachers (Research Rep. 1967-R5, 1967) encompassing school systems with enrollments of 300 or more students.

[3] Unless otherwise noted, the policies quoted below were in effect as of the 1971-72 school year.

[4] Board of Education, Tipp City Exempted Village Schools, Rules and Regulations 72.

becomes noticeable" before then.[5] Other school systems require the taking of leave ". . . when physical fitness and appearance become apparent [sic]";[6] "when visible signs are apparent";[7] depending on the "attitude of the children and parents toward the situation"[8] or the "physical appearance of the teacher",[9] or at "such time as maternity clothes are necessary."[10] The Franklin County, North Carolina school system requires teachers to resign within the third month of pregnancy under a rule which states: "This applies to personnel working directly with students."[11] A "preamble" to the maternity-leave provision in a Nebraska school system states that "teaching while in *obvious* states of pregnancy is not for the best interests of the school's educational program." (Emphasis added.)[12] In Kokomo, Indiana, teachers are exhorted to "exercise good judgment in requesting a leave for pregnancy so that criticism and possible embarrassment may be avoided."[13]

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[5] Board of Education, Danville Independent School District, Policies, Rules and Regulations ch. 3, § 3(f).

[6] Osseo-Fairchild Schools (Osseo, Wisc.), Teachers Handbook § 12.

[7] Clairton School District Board (Clairton, Pa.), Policy Manual § 4511.

[8] Pendleton School District No. 16-R (Pendleton, Ore.), Handbook of Policies and Procedures art. VI, § A.

[9] Contract between Monticello (N.Y.) Central School District and Monticello Teachers Association art. 28(C).

[10] Unified School District No. 344 (Pleasanton, Kan.), School Board Policies art. VII, § 36.

[11] Franklin County Schools, Handbook.

[12] Milford Public Schools (Milford, Neb.), Teaching Contract.

[13] Board of School Trustees, Kokomo-Center Twp. Consolidated School Corp. (Kokomo, Ind.), Administrative Handbook § k(5), at 30.

A related attitude, reflected in both the mandatory leave dates and the minimum return dates of most maternity-leave policies,[14] is a paternalistic concern for the health and safety of female teachers or the welfare of their families. For example, a Pennsylvania school system provides leave for maternity only reluctantly, stating that:

> A married woman's first responsibility will naturally and rightfully be to her husband, household, and children. Should a married female employee become pregnant, her resignation would be best for her, her family and the school.[15]

Similarly, a Wisconsin school system addresses itself not to the maternity of "teachers" or "employees" but "of wives working in the . . . system."[16]

The same Victorian aversion to pregnancy and paternalistic concern for the "protection" of female teachers and their families were echoed in the testimony of school officials in the present cases. For example, in No. 72-1129, one school board member referred in deposition to the pregnant teacher's "ap-

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[14] The 1966 survey indicated that most policies specified as a return date the beginning of the new school term following anywhere from three months to two years after the birth of the child. ERS 1966 Circular, *supra* note 2, at 4, 6-16.

[15] Central Dauphin School District (Harrisburg, Pa.), Policy Manual ch. 5, art. 7. A protective concern would also seem to account for the rule of an Indiana school system which permits a teacher to do substitute teaching during her required two-year absence following the birth of her child, but "in no case may such a teacher do more than a total of 30 days of substitute teaching in any one school year." ERS 1966 Circular, *supra* note 2, at 19.

[16] Howard-Suamico School System (Green Bay, Wisc.), Teachers Handbook.

pearance" (A. 43); another expressed concern over the teacher's becoming "very conspicuous" (A. 53) and the possibility of children saying, "my teacher swallowed a watermelon, things like that." (A. 54.) The former school superintendent who originated the maternity leave policy for the Cleveland Board of Education provided the following explanation for the mandatory leave date:

> Well, we had some very embarrassing situations develop where women, who were pregnant, would stay too long in the classroom, and the result was that those teachers were subjected to humiliations, indignities on the part of pupils, generally, who giggled about it, and it was embarrassing to the teacher and it was also disruptive of the classroom. (A. 173a, No. 72-777.)

In justification of the specific cutoff date, he explained "it was at that point when the physical appearance begins to change." (A. 176a, No. 72-777.)

Similarly, a "protective" motive for the mandatory leave date was expressed by Chesterfield County school board members in their concern over the "welfare and the safety of the teacher" (A. 45, No. 72-1129) and "the possibility of an accident" due to "pushing" by students (A. 48, No. 72-1129). A related attitude was expressed by the author of the present Cleveland school board rule in defense of the minimum return date: "I am a strong believer that young children ought to have the mother there . . . . it is very important that they be there for the love and tender care of the babies." (A. 184a, No. 72-777.) Indeed, the NEA survey reveals that as recently as 1966 the Cleveland policy gave the teacher's husband a voice in

deciding whether or not the time had come for her to return to her teaching duties.[17]

It is ironic that this kind of "protective" concern for the health of the teacher is expressed by the same school systems which refuse to permit a physician to determine how long the teacher can continue working prior to delivery, or how soon she may return thereafter. In any event, this type of rationale has been characterized by this Court as "an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." *Frontiero* v. *Richardson,* —— U.S. ——, 93 S.Ct. 1764, 1769 (1973). The regulations in issue here cannot be justified by that rationale any more than by the outmoded and irrational attitudes toward sex and childbirth which underlie them. "Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word." *Green* v. *Waterford Board of Education,* 473 F.2d 629, 635 (2d Cir. 1973).

In short, whatever new justifications may now be offered in support of the maternity-leave policies at issue, it is clear that their origins are rooted in outmoded attitudes toward pregnancy and women. Moreover, as we shall now show, these policies are also the direct outgrowth of a history of discrimination against women teachers in the public schools.

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[17] The husband's agreement was required along with the recommendations of the physician and the Bureau of Personnel. ERS 1966 Circular, *supra* note 2, at 24.

B. The Relationship of Mandatory Maternity-Leave Policies to Historic Patterns of Discrimination Against Female Teachers

Although women have long played a major role in the education profession, they have long suffered from a variety of forms of discrimination. This discrimination was often premised on the view that a woman should not pursue a professional career because her proper place is in the home. Current mandatory maternity-leave rules, we believe, are direct descendants of these earlier discriminatory attitudes and policies.

Women began to enter the teaching profession in increasing numbers after the Civil War. By 1899, 70 per cent of public school teachers were women, and by 1919 the proportion had increased to 86 per cent.[18] Around the turn of the century, there began to develop a tide of opposition to this trend. It was claimed that, by allowing so many women in the schools, "we shall . . . warp the psychics [sic] of our boys and young men into femininity."[19] One result of this concern over the "feminization" of American education was the practice of offering men higher salaries than women to induce them to enter the profession.[20] Another result was the development of rules prohibiting the employment of married women or the retention of female teachers after their marriage.[21] This ban was widespread by the second

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[18] NEA Research Div., Status and Trends: Vital Statistics, Education and Public Finance 15 (Research Rep. 1959-R13, 1959).

[19] Quoted in I Woody, A History of Women's Education in the United States 513 (1966) [hereinafter cited as I Woody]. *See generally id.* at 505-14.

[20] *See* p. 19, *infra*.

[21] I Woody, *supra* note 19, at 509.

decade of this century and became even more prevalent in the 1930's as increasing numbers of unemployed men became available to replace women teachers.[22]

Many of the attitudes which underlay the prohibition against married teachers are identical to those which later led to development of mandatory leave for pregnant teachers. As one critic pointed out, the prohibition suggested "that the married state is undignified or unclean or otherwise undesirable for those women who engage in such noble forms of service as school teaching."[23] Another explanation—echoed in testimony below relating to the proper role of the female[24]—involved fears that employment of married women would discourage the rearing of families[25] or, at the very least, would prevent women from devoting sufficient attention and care to their homes.[26] "Impaired efficiency" was another argument voiced in defense of this policy, the claim being that "married women teachers are usually too preoc-

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[22] *See* Beale, Are American Teachers Free? 384 ff, 496 (1936). An NEA survey indicated that in 1928 61 per cent of the school systems in cities of 2,500 or more refused to employ married women, and 50.8 per cent terminated women teachers who married while under contract; by 1931, the percentages had risen to 76.6 and 62.9 per cent, respectively. *Administrative Practices Affecting Classroom Teachers, Part I: The Selection and Appointment of Teachers,* 10 NEA Research Bull. 1, 20 (1932) [hereinafter cited as Administrative Practices I].

[23] NEA, Status of the Married Woman Teacher 18 (1938).

[24] *See* p. 11, *supra.*

[25] Snedden, *Personnel Problems in Educational Administration: Married Women as Public School Teachers,* 36 Teachers College Record 613, 621 (1935).

[26] Administrative Practices I, *supra* note 22, at 14.

cupied with home interests to give their best efforts to that school." [27]

A unique variation on this prohibition appeared in a 1915 rule in Cleveland, which forced teachers to resign when they married, but permitted them to be rehired on a substitute basis at a lower salary at the discretion of the authorities. Within a year, there were 250 married substitutes in Cleveland.[28] A preference for male teachers was, thereby, neatly combined with thrift.

Enlightened opinion, state court decisions,[29] and the reluctance of male teachers to enter a low-paying profession [30] gradually eroded restrictions on employ-

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[27] *Ibid.* *See* Peters, The Status of the Married Woman Teacher 52 (Teachers College Contributions to Education, No. 603, 1934). This argument bears a striking resemblance to some of the testimony in the present cases. Thus, a school board member in No. 72-1129 stated, "we think the teacher cannot give full time to her classroom work because . . . she has to give more time to her health and her environment." (A. 54.) And in No. 72-777, a former school superintendent referred to one teacher as "really a good teacher, able, attractive, but her interest was in rearing a family instead of teaching school." (A. 182a.)

[28] Beale, Are American Teachers Free? 384 (1936). Some years later, Cleveland modified the rule somewhat to allow the rehiring of a teacher as a substitute after a semester following her termination for marriage; then, upon recommendation of her superior and if she ranked in the upper quarter of her group, she might be permanently reinstated. *Ibid.*

[29] *See, e.g., School City of Elwood* v. *State*, 203 Ind. 626, 180 N.E. 471 (1932); *Baker* v. *School District*, 120 Neb. 513, 233 N.W. 897 (1931); *State* v. *Board of School Directors of City of Milwaukee*, 179 Wisc. 284; 191 N.W. 746 (1923); *Richards* v. *District School Board*, 78 Ore. 621, 153 P. 482 (1915); *Jameson* v. *Board of Education of Union School District*, 74 W.Va. 389, 81 N.E. 1126 (1914). *See generally* Office of Education, U.S. Dep't of the Interior, The Legal Status of Married Women Teachers (1934).

[30] *See* Elsbree, Teachers' Salaries 43 (1931).

ment of married women in most school systems. In their place, however, were erected barriers against the employment of women with children and the retention of pregnant teachers. The new policies were defended on grounds similar to those used to defend the restrictions on the employment of married women, including "the unfavorable impression which appearances of impending maternity would make on adolescents" [31] and the notion that "there is no home without a mother, and . . . the old-fashioned mother who considers it her primary function to rear and maintain a pure and proper home is doing yeoman service to the state. The home can never fulfill its true function when its head is an absent mother." [32]

As economic and judicial pressure [33] continued to exercise a moderating influence, the bans against female teachers with children generally disappeared, but they were replaced by mandatory maternity-leave

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[31] Quoted in Brubacher, *The Judicial Status of Marriage and Maternity as an Obstacle to the Education of Women for Professional Careers in Public School Teaching,* XXVI School and Society 428, 433 (1927).

[32] *Ibid.*

[33] An early New York decision, rejecting the right of a school board to terminate a pregnant woman on account of "neglect of duty" due to absence, stated: "The policy of our laws favors marriage and the birth of children, and I know of no provision of our statute law or any principle of the common law which justifies the inference that a public policy which concededly sanctions the employment of married women as teachers treats as ground for exclusion the act of a married woman in giving birth to a child. . . . It is pure sophistry to argue, as does the learned counsel for the respondent in his brief, that maternity is an indication of health and, therefore, can not be said to cause 'serious personal illness.' " *People ex rel. Peixotto* v. *Board of Education,* 82 Misc. 684, 692, 144 N.Y.S. 87 (Sup. Ct. 1913).

provisions exemplified by the present cases. A 1932 NEA report stated that "Such provisions are designed . . . to meet the *usual objections to permitting a woman to remain in the classroom after pregnancy becomes evident and while the child still needs most of her attention.*" [34] (Emphasis added.) By 1948, about half of all public schools had replaced their bans on employing mothers as teachers with mandatory maternity-leave rules identical to those in effect today.[35]

It is thus apparent that today's mandatory maternity-leave policies are directly descended from earlier discriminatory policies, which initially banned married women, and later women with children, from teaching in the public schools. The notion that it is inappropriate or unseemly for a married woman to be a teacher, or that a mother is incapable of both pursuing a teaching career and discharging her family responsibilities, seems strange and archaic today. Yet essentially identical justifications are still offered for rules which require pregnant teachers to cease working at an early stage of pregnancy, or which prevent such teachers from returning to work for a specified period after childbirth. Policies with such tainted roots, we submit, should be examined with extreme suspicion.

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[34] Administrative Practices I, *supra* note 22, at 20.

[35] Between 1948 and 1966, the number of school systems which established leaves in place of termination for pregnancy increased from 57 per cent to 89 per cent. The leave and return dates established in the earlier maternity-leave policies were largely followed in the later ones, and no effort was made to revise them in accordance with more modern medical opinion and practice. *Compare* NEA Research Div., Maternity Leave Provisions in 157 School Systems, in Cities over 30,000 Population 2 (Educational Research Service Circular No. 6, 1948) *with* ERS 1966 Circular, *supra* note 2, at 1.

II.

MANDATORY MATERNITY-LEAVE POLICIES CONTRIBUTE TO AND REINFORCE A GENERAL PATTERN OF DISCRIMINATION AGAINST WOMEN IN THE TEACHING PROFESSION

Maternity-leave policies of the type at issue here have a serious adverse impact on the careers of women teachers. Such policies contribute to and reinforce the already disadvantageous position in which women teachers find themselves *vis-a-vis* their male counterparts.

A. Current Patterns of Discirimination Against Female Teachers

Despite their large numbers and long-time participation in the profession, women are still discriminated against in the public schools. For example, as of the 1972-73 school year, women comprised 62.8 per cent of all full-time public school professional personnel; yet only 13.5 per cent of principals, 12. 5 per cent of assistant principals, 6.2 per cent of deputy and associate school superintendents, 5.3 per cent of assistant school superintendents, and 0.1 per cent of school superintendents were women.[36] The small number of women in better-paid administrative positions is particularly striking in view of the fact that a higher percentage of women than men in the profession have 20 years or more of full-time teaching experience[37] and 15 years or more in their present school systems.[38]

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[36] NEA Research Div., 26th Biennial Salary and Staff Survey of Public School Professional Personnel, 1972-73, at 9 (Research Rep. 1973-R5, 1973) [hereinafter cited as Research Rep. 1973-R5].

[37] 18.9 per cent of women and 12.7 per cent of men. NEA Research Div., Teacher Opinion Poll XV (1973) (unpublished data, submitted to U.S. Bureau of the Census).

[38] 15 per cent of women and 13.5 per cent of men. *Ibid.*

Moreover, despite their greater seniority, the average annual salary of female classroom teachers in 1972-73 was almost 10 per cent less than for men in comparable positions.[39] Even in those few positions in the profession where women comprise the highest percentage of personnel (91.8 per cent of school librarians and 98.6 per cent of school nurses)[40], similar or sharper salary differentials obtained: the average salary of female school nurses was $9,218, compared to $10,059 for male school nurses; the average salary of female school librarians was $10,352, while the figure for their male counterparts was $11,828—a differential of almost 15 per cent.[41]

This pattern of discriminatory treatment of women in regard to salary and promotion to administrative positions is a long-standing one, and appears to have originated with the desire, referred to above (*see* p. 13 *supra*), to "de-feminize" the schools and encourage men to enter the profession. In 1930, 42 per cent of junior high schools and 54.8 per cent of senior high schools reported a policy of paying men teachers a higher salary than they paid women of equal training and experience.[42] A typical school board policy of that period stated:

> The Board of Education believes that a considerable per cent of the teachers in the upper grades

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[39] $9,787 for women, $10,654 for men. Research Rep. 1973-R5, *supra* note 36, at 13.

[40] *Id.* at 9.

[41] *Id.* at 13.

[42] *Administrative Practices Affecting Classroom Teachers, Part II: The Retention, Promotion, and Improvement of Teachers*, 10 NEA Research Bull. 33, 42-3 (1932) [hereinafter cited as Administrative Practices II].

> and in the high school should be men, and having found from experience that they are more difficult to obtain, reserves the right to pay an additional amount above the schedule when necessary to secure the services of exceptionally well-qualified men for the grades mentioned.[43]

We believe that the same basic attitudes and motives which led to the adoption of these overtly discriminatory policies also underlay the mandatory maternity-leave policies, which developed at approximately the same time. But whatever the original motives for the adoption of these policies, it is clear that their continued operation perpetuates and exacerbates the general pattern of discrimination against women which still prevails in most school systems.

B. The Practical Effects of Mandatory Maternity-Leave Policies

In order to measure the impact of mandatory maternity-leave rules, it is necessary to compare the treatment of teachers under those rules with the treatment such teachers would receive if pregnancy were covered by the leave policies applicable to other forms of temporary physical disability.[44] The basic difference (although, as we shall see, not the only one) is that the maternity-leave policies prescribe a fixed

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[43] Quoted in Morris, The Single Salary Schedule 69 (Teachers College Contributions to Education, No. 413, 1930). A 1932 NEA report on teachers' salaries stated: "Probably no other factor affecting teachers' salaries has received so much attention as the question of whether men and women . . . shall be paid the same salary." Administrative Practices II, *supra* note 42, at 42.

[44] Unless otherwise noted, the comparisons discussed in this section are based on a 1965-66 NEA survey of over 12,000 school systems with enrollments of 300 students or more. NEA Research Div., Leaves of Absence for Classroom Teachers, 1965-66 (Research Rep. 1967-R5, 1967) [hereinafter cited as Research Rep. 1967-R5].

period of absence, while normal sick-leave policies require teachers to leave work only when they are physically incapable of performing their jobs, and permit them to return as soon as they are able.[45]

The immediate result of this difference in treatment is that the pregnant teacher is forced to suffer a much greater loss of salary than she would if normal sick-leave policies were applied. Not only is she required to leave work at a prescribed stage of pregnancy, even if she is still capable of continuing to work, but she is also usually not permitted to return for a specified period of time after childbirth. Moreover, in most cases she is required to wait until the commencement of a new school term or year—or even longer, if no vacancy is available at that time.[46] As a result, the teacher frequently loses an entire year's salary or more, although she may actually be disabled for only a few weeks.[47] In addition

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[45] *Compare id.* at 14 ff *with id.* at 20 ff; *see generally* NEA Research Div., Paid Leave Provisions for Teachers in Negotiation Agreements (Research Rep. 1969-R9, 1969); ERS 1966 Circular, *supra* note 2.

[46] *See* n.14, *supra.* The Cleveland Board of Education requires a teacher to wait until "the *beginning of the* regular school semester which follows the child's age of *three (3) months.*" (A. 39-40a, No. 72-777.) The Chesterfield School Board rule does not guarantee the returning teacher a position until the beginning of the school year following her eligibility to return, such eligibility to be granted upon authorization from her physician and "when she can give full assurance that care of the child will cause minimal interference with job responsibilities." (A. 21, No. 72-1129.)

[47] Commenting on an eminent anthropologist's finding that in many societies, women take much less time—from one hour to five days—to return to their normal chores, a district court has pointed out:

> This tends to suggest that the defendant Board's very solicitous treatment of pregnancy, including the requirement

to the loss of salary, such fringe benefits as life and health insurance, social security coverage, and payments to retirement programs are also suspended during the term of most maternity leaves.[48]

It is also significant that 98.7 per cent of all school systems continue the payment of salaries and fringe benefits for a specified period during sick leave, and 91 per cent permit teachers to accumulate their sick leave allowance from year to year.[49] Moreover, 52.2

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that the new mother not return to her job for one year following delivery is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that Mrs. Heath does not fit neatly into the stereotyped vision the defendant Board has of the "correct" female response to pregnancy should not redound to her economic or professional detriment. *Heath* v. *Westerville Board of Education*, 345 F.Supp. 501, 505-06 n.1 (S.D. Ohio 1972).

[48] Research Rep. 1967-R5, *supra* note 44, at 26; ERS 1966 Circular, *supra* note 2, at 15. The South Butler County, Pennsylvania, schools, for example, provide that a teacher on maternity leave "shall not be entitled to any fringe benefit under the provisions of any contract and the Board of School Directors shall not be required to make any contribution towards the retirement fund, insurance programs, etc., during the period of said leave of absence." Contract between South Butler County School District and South Butler County Education Association, App. C (1973-76). The Chesterfield County rule provides for the retention but not accumulation, during maternity leave, of "all personnel benefits accrued, including seniority" (A. 21, No. 72-1129).

[49] 62.9 per cent of the schools surveyed provided between ten and 14 days annually for paid sick leave. The median number of days available under provisions for paid sick leave was 12.3 per year, cumulative to 69.2. Research Rep. 1967-R5, *supra* note 44, at 16-17. Chesterfield County provides 10 days annually (A. 62, No. 1129); Cleveland provides 15 days, cumulative to 240. Agreement between Board of Education of Cleveland City School District and Cleveland Teachers Union, Local 279, art. VI, § 4 (1971).

per cent allow teachers to use their sick leave allowance for absences due to illness in their immediate families, 47.4 per cent for deaths in the family, and 19.9 per cent for personal business.[50] No schools in the 1956-66 survey, however, permit sick-leave allowance to be used for maternity or maternity-related illnesses.[51] Whether or not this practice of paying teachers on normal sick leave while withholding salary and other benefits from teachers on maternity leave is a constitutional one—this question is not now before the Court—it certainly tends to exacerbate the financial losses which pregnant teachers are forced to suffer by virtue of the mandatory maternity-leave policies which are in issue here.[52]

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[50] A smaller percentage of schools permitted sick leave allowances to be used for court summons, jury duty, religious holidays, professional meetings, visiting other schools and military reserve duty. Research Rep. 1967-R5, *supra* note 44, at 19. A few school systems allow a male teacher to use his sick leave allowance when his wife gives birth, or provide, for example, that "A husband may be granted leave without loss of pay on the day his wife gives birth", while prohibiting a female teacher from using sick leave allowance when *she* gives birth. Mt. Diablo Unified School District (Concord, Calif.), Faculty Handbook § 4152.01-1 (1972-73). *See also* ERS 1966 Circular, *supra* note 2, at 24.

[51] 70.9 per cent of the schools surveyed provided unpaid maternity leave, and the remainder had no provision for maternity leave. Research Rep. 1967-R5, *supra* note 44, at 20.

[52] Despite the fact that compensation is continued during normal sick leave but denied during maternity leave, almost all maternity-leave rules require a physician's statement confirming the pregnancy and expected date of birth, but only 4.3 per cent of school districts routinely require a teacher to verify with a physician's statement that an absence was due to illness. In most cases (64.5 per cent), proof of illness is only required in unusual circumstances, such as where there have been excessive absences or absences exceeding a stipulated number of days. Research Rep. 1967-R5, *supra* note 44, at 18.

The immediate financial loss, however, is only a part of the injury which results from treating pregnancy differently from other disabilities. In most cases, a teacher who returns from maternity leave, unlike a teacher who returns from sick leave, is not guaranteed assignment to the same job which she had when she left.[53] Instead, she may be forced to accept a job with lower pay, or to teach a subject other than the one for which she was trained or in which she has a particular interest. This problem is particularly acute with respect to those fields which are taught by only a few teachers in a school system, such as certain foreign languages, speech therapy, special education, etc. Many teachers accept a position with a particular school system primarily because it offers an opportunity to teach a particular subject, and the loss of that opportunity can be a serious blow to the teacher's career plans.

Furthermore, the large majority of maternity-leave rules deny longevity credit for pay purposes for the period of maternity leave (but not sick leave)[54], so that the teacher must return to work at the same rate of pay which she had when she left. Since most teacher salary scales provide for annual increases, the denial of credit for the period of leave means that

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[53] 96 per cent of the schools in the 1966 survey do not guarantee to the returning teacher her former position. ERS 1966 Circular, *supra* note 2, at 5. In Cleveland, a teacher "shall have priority in reassignment to a vacancy for which she is qualified under her certificate . . ." (A. 40a, No. 72-777). In Chesterfield County, a teacher is entitled to an offer of "re-employment for the first vacancy that occurs." (A. 21, No. 72-1129.)

[54] *See* ERS 1966 Circular, *supra* note 2, at 5, 6-16; Research Rep. 1967-R5, *supra* note 44, at 25.

the teacher is *permanently* one step below where she would otherwise be on the pay scale.

Seniority is also generally suspended for the period of maternity leave, but continued during sick leave.[55] Among other things, seniority affects promotional opportunity, reductions-in-force, retirement and other fringe benefits. Moreover, to the extent that promotion is based on personal evaluation—as is the case in most school systems—the teacher on maternity leave is likely to lose a year's evaluations, in addition to the year's experience and training which might be expected to improve her teaching abilities.

Of particular significance is the adverse effect which mandatory maternity-leave policies have upon the opportunities available to *all* female teachers of childbearing age for promotion to administrative posts. The lengthy absence required by the regulations precludes the fulfillment of administrative duties, and those responsible for administrative appointments must consider the possibility of a candidate's prospective pregnancy in evaluating her for promotion. Whatever other reasons may account for the dearth of women in administrative positions, forced maternity-leave rules must surely play a signficant role.

Lastly, the very term "leave" is itself often a misnomer, since many school systems permit a teacher to return only at the discretion of the school officials [56]

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[55] *See* ERS 1966 Circular, *supra* note 2, at 5.

[56] For example, as of 1966 the Evansville Vandenburgh School Corporation, Indiana, provided for the return of the teacher "if the Board of School Trustees, in its discretion, thinks that her return is wise." ERS 1966 Circular, *supra* note 2, at 19.

or, as in the case of the Chesterfield County School Board, grant maternity leave "only to those persons who have a record of satisfactory performance." (A. 20, No. 77-1129.) "Maternity leave" thus provides a convenient means of terminating a teacher without sufficient grounds[57] and without the procedural due process applicable to terminations for cause.[58] In addition, many school systems explicitly prohibit maternity leave and require termination of a pregnant teacher's employment contract,[59] and one-third of the school systems which grant maternity leave require tenure status for eligibility.[60] Thus, unlike other forms of temporary disability, maternity means the end of a teacher's employment in a significant number of school systems.

The adverse effects of mandatory maternity-leave policies would be eliminated, or at least greatly ameliorated, if pregnancy were treated like any other form of temporary disability. We submit that there is no valid reason for treating pregnancy differently from any other temporary disability, and that such disparate treatment cannot be justified under either a "strict" or "permissive" application of the Equal-Protection Clause.

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[57] *See, e.g., Cerra* v. *School District*, 450 Pa. 207, 299 A.2d 277, 5 FEP 480, 481-2 (Pa. 1973).

[58] *See, e.g., Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

[59] 11 per cent of school systems with enrollments of 25,000 or more students, ERS 1966 Circular, *supra* note 2, at 1; 29.1 per cent of school systems with enrollments of 300 or more. Research Rep. 1967-R5, *supra* note 44, at 20.

[60] ERS 1966 Circular, *supra* note 2, at 2. The Cleveland schools require a full year's employment for eligibility. (A. 42a-43a, No. 72-777.)

CONCLUSION

For the reasons stated, the *amici curiae* believe that the judgment in No.72-777 should be affirmed and the judgment in No. 72-1129 should be reversed.

Respectfully submitted,

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